Supreme Court, U.S.
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No. 01-1489

In The Supreme Court of the United States

NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION,

Petitioner,

v.

WILLIAM H. SORRELL, As Attorney General of the State of Vermont, and SCOTT JOHNSTONE, As Secretary, Vermont Agency of Natural Resources,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, consistent with this Court's dormant Commerce Clause jurisprudence, the State of Vermont may require mercury-containing products that are sold in Vermont to be labeled in a manner that informs consumers of the presence of mercury and the need for appropriate disposal?

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STATUTORY AND REGULATORY PROVISIONS INVOLVED

Petitioner has omitted relevant parts of the statutory and regulatory provisions involved in this case. Those provisions are set forth in full in the Appendix to this brief.

STATEMENT OF THE CASE

In 1998, the Vermont Legislature enacted a statute that mandates labels on products that contain mercury and are sold in Vermont. Vt. Stat. Ann. tit. 10, § 6621d (amended 1999). The labeling statute is part of a comprehensive strategy to reduce in-state sources of mercury pollution. Vt. Stat. Ann. tit. 10, §§ 6620a, 6621a, 6621b, 6621d, 6621e, 6623-6632 (1997 & Supp. 2001). Local sources are responsible for up to 60% of Vermont's mercury pollution, and mercury from spent lamps is responsible for at least 21% of Vermont's in-state mercury emissions.[1] JA 431-432.[2]

Under the statute, the label and packaging on mercury-containing products must inform consumers that the product contains mercury and, on disposal, that the product should be recycled or disposed of as hazardous

[1] NEMA claims that the use of mercury-containing lamps "results in a net reduction of the emission of pollutants (including mercury) into the environment." Pet. 4 (citing Pet. App. 26). The district court found that the use of mercury-containing lamps reduces the amount of *pollutants* released into the environment, not the amount of *mercury* released into the environment. Pet. App. 26.

[2] The notation "JA" refers to items in the parties' Joint Appendix before the court of appeals.

waste. Vt. Stat. Ann. tit. 10, § 6621d(a). The labeling requirement applies to thermostats, thermometers, switches, medical and scientific devices, electrical relays and other electrical devices, lamps, and certain batteries. *Id.* Implementing regulations allow for mutually agreeable alternatives to the labeling requirement upon a manufacturer's demonstration that it cannot reasonably comply with the labeling law.[3] Pet. App. 27-28.

Petitioner NEMA, whose members produce mercury-containing lamps, brought suit to challenge the statute under the Commerce Clause, First Amendment, Supremacy Clause and Due Process Clause of the United States Constitution. The labeling requirement has not been challenged by any other affected manufacturer.

1. The District Court Proceedings.

Respondents ("Vermont" or the "state") were served with NEMA's complaint and motion for preliminary injunction on July 27, 1999. On August 5, 1999, the district court set NEMA's motion for preliminary injunction for hearing on September 22-24, 1999. The court also ordered that Vermont's memorandum in opposition and affidavits be filed by September 14 and that exhibits be filed by September 17. Only persons who had filed affidavits could be called as witnesses.

The state called nine witnesses at the preliminary injunction hearing. The testimony addressed mercury's serious impacts on human health and the environment;

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[3] NEMA's statement of the case, Pet. 4, does not mention the possibility of alternative labeling plans.

the routes by which mercury enters the environment; using marketing theory to change consumer behavior; and Vermont's policy regarding mercury-containing lamps. NEMA does not dispute that mercury is a toxic substance, that fluorescent lamps contain mercury, or that mercury is released into the environment when mercury-containing lamps are disposed of in landfills. NEMA's own data indicated that the cost of complying with Vermont's statute was less than $0.014 per bulb. JA 159.

Vermont also filed affidavits from Steven Lindberg, Ph.D., an environmental chemist with the Oak Ridge National Laboratory, and Russell Atkinson, Ph.D., a lamp engineer and materials specialist. Drs. Lindberg and Atkinson were not available to testify at the hearing due to the short notice provided by the court. Although Vermont sought to continue the hearing to allow their testimony, the court declined to continue the hearing and excluded the affidavits from evidence. JA 333-34; JA 581-88.

The district court also took the unusual step of denying several other New England states from appearing as *amici curiae* in the preliminary injunction proceedings.[4] In so doing, the court excluded the affidavits of waste management program directors from four other New England States. The affiants uniformly stated that the Vermont mercury-labeling requirement does not conflict or interfere with their state programs. JA 138-53.

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[4] "To the extent the movant [New Hampshire representing the *amici* States] wishes to file an *amicus curiae* appearance, that motion is DENIED. The Clerk is instructed, however, to accept for filing the submitted brief so that the Court may consider it as part of the record." District Court Order 9/16/99 (paper 12).

On November 8, 1999, the district court issued a decision granting NEMA's request for a preliminary injunction. On the abbreviated factual record before it, the district court held that NEMA was likely to succeed on its First Amendment and Commerce Clause claims. The district court also concluded that manufacturers' compliance costs were sufficient to show a risk of irreparable harm, even though the court found that these costs would be passed on to consumers. Pet. App. 31.

2. The Second Circuit Proceedings.

On appeal, the Second Circuit vacated the grant of a preliminary injunction. With respect to the Commerce Clause, the court of appeals held that NEMA "cannot show likely success on the merits of its Commerce Clause claim." Pet. App. 5. Because NEMA had already conceded that Vermont's statute is nondiscriminatory, *id.*, the court proceeded with a familiar recitation of the balancing test in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

> In *Pike,* the Supreme Court adopted a balancing test to determine whether state statutes that incidentally burden interstate commerce violate the Commerce Clause. The Court held that
>
> > [w]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden

> that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.
>
> For a state statute to run afoul of the *Pike* standard, the statute, at a minimum, must impose a burden on interstate commerce that is qualitatively or quantitatively different from that imposed on intrastate commerce.

Pet. App. 5-6 (quoting *Pike*, 397 U.S. at 142 (citations omitted)). In defining what constitutes a burden on interstate commerce, the court of appeals acknowledged the "strong tradition of judicial deference to legislative decisions" that must be overcome before a court will second-guess legislative choices. Pet. App. 7.

NEMA alleged that Vermont's mercury labeling statute burdened interstate commerce by (1) controlling commerce beyond the state's borders and (2) imposing regulatory requirements inconsistent with those of other states.[5] Pet. App. 7. The court of appeals rejected both of these claims.

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[5] NEMA asserts that the court of appeals identified only two types of disparate burdens that would trigger *Pike* analysis. In fact, the court of appeals stated that "several type of burdens on interstate commerce would qualify as 'disparate' to trigger *Pike* balancing," but found that NEMA had alleged only two types of potential burdens. Pet. App. 7. To the extent that NEMA challenged the cost of applying the label to lamps sold in Vermont as a burden on interstate commerce, the court of appeals found that NEMA's members could pass on most of their compliance costs to Vermont consumers, and that any residual compliance costs are "attributable to legitimate intrastate regulation." Pet. App. 9-10.

First, Vermont's statute does not require manufacturers to label mercury-containing products that are sold in other states. "The Vermont statute, by its terms, is 'indifferent' to whether lamps sold anywhere else in the United States are labeled or not." Pet. App. 9. If manufacturers choose to label lamps solely for the Vermont market, they can "pass much of the increased costs along to Vermont consumers in the form of higher prices." Pet. App. 9. The court acknowledged some risk that manufacturers would limit sales in Vermont due to the labeling requirement, but noted that "[w]hether the unavailability of mercury-bearing lamps in the state redounds to the benefit of state residents is a question that the political branches of the State of Vermont were entitled to decide." Pet. App. 12.

Second, Vermont's labeling requirement does not conflict with the regulatory schemes of other States. "NEMA concedes that no other state even regulates the labeling of mercury-bearing bulbs, much less does so in conflict with Vermont's approach." Pet. App. 13.

Finally, the court of appeals found that Congress, through the Resource Conservation and Recovery Act, 42 U.S.C. § 6929, "expressly leaves individual states with flexibility to adopt regulations more stringent than those imposed by the federal government." Pet. App. 14. The court of appeals held that RCRA, though not a shield, offers at least a "'sturdy buffer'" against NEMA's Commerce Clause claim. *Id.* (quoting *Grocery Mfrs. of Am. v. Gerace*, 755 F.2d 993, 1005 (2d Cir. 1985)).

REASONS FOR DENIAL OF THE WRIT

There is no compelling reason for the Court to review the decision of the court of appeals in this case. Contrary to NEMA's assertions, no conflict over dormant Commerce Clause jurisprudence has emerged in the courts of appeals. The lower court's analysis in this case is consistent not only with the decisions of other circuits but with this Court's precedents as well. In addition, this case is not a suitable vehicle for review by this Court, both because this case is an appeal from an interlocutory order and because of the incomplete nature of the evidentiary record.

A. The decision below does not conflict with the decisions of the other courts of appeals.

Although NEMA claims that a "square[]" conflict exists among the circuits, Pet. 15, in fact not a single circuit has acknowledged a conflict in dormant Commerce Clause analysis. The cases cited by NEMA, Pet. 14-18, do not support its claim of a split among the circuits.

1. NEMA's assertion of a conflict between the Tenth Circuit and the Second Circuit is unfounded. NEMA claims that the Tenth Circuit specifically rejected the Second Circuit's definition of incidental burdens on interstate commerce in *Dorrance v. McCarthy*, 957 F.2d 761 (10th Cir. 1992), but a closer examination reveals no conflict. The *Dorrance* court, in its discussion of *Pike,* cites no decisions from the Second Circuit or any other circuit and does not suggest that a conflict exists. Several years after the *Dorrance* decision, the Tenth Circuit explicitly adopted the Second Circuit's statement of the *Pike* test, including its definition of incidental burdens, in *V-1 Oil*

Co. v. Utah State Dep't of Public Safety, 131 F.3d 1415 (10th Cir. 1997):

> The "incidental burdens" of the *Pike* inquiry "are the burdens on interstate commerce that exceed the burdens on intrastate commerce." *New York State Trawlers Ass'n v. Jorling,* 16 F.3d 1303, 1308 (2d Cir. 1994) (citing *Clover Leaf Creamery*, 449 U.S. at 471, 101 S. Ct. at 727). Such incidental burdens might also "include the disruption of [interstate] travel and shipping due to a lack of uniformity in state laws, impacts on commerce beyond the borders of the defendant [S]tate, and impacts that fall more heavily on out-of-state interests." *Pacific Northwest Venison Producers v. Smitch,* 20 F.3d 1008, 1015, 1017 (9th Cir. 1994) (upholding Washington State's regulations "protecting native wildlife") (internal citations omitted).

V-1 Oil Co., 131 F.3d at 1425 (upholding Utah's licensing and certification fees on liquefied petroleum gas facilities). Having adopted the Second Circuit's reasoning on this issue, the Tenth Circuit clearly does not believe itself to be in conflict with that court.

2. Setting aside the Tenth Circuit, NEMA cites a laundry list of other cases in an attempt to buttress its argument. NEMA claims that the Fifth, Sixth and Eighth Circuits have each applied the *Pike* test to strike down nondiscriminatory statutes without requiring a showing of an incidental burden, or "disparate impact," on interstate commerce. Pet. 17-18. Again, a closer look shows that the purported conflict does not exist.

In several of the cases cited by NEMA, the courts explicitly found that the challenged statutes either

discriminated against out-of-state residents or directly regulated out-of-state transactions. *See McNeilus Truck & Mfg., Inc. v. Ohio*, 226 F.3d 429, 442 (6th Cir. 2000) (statute has "discriminatory effect" because "in-state dealers and remanufacturers benefit under the statute to the exclusion of out-of-state remanufacturers"); *Pioneer Military Lending, Inc. v. Manning*, 2 F.3d 280, 283-84 (8th Cir. 1993) (Missouri's small loan regulatory scheme burdened out-of-state firm but not in-state firms); *ANR Pipeline Co. v. Schneidewind*, 801 F.2d 228, 236 (6th Cir. 1986) ("a requirement that [natural gas companies] obtain 'advance approval' from the [Michigan Public Service Commission] before issuing securities, the proceeds of which may be used to finance a project in another State, directly regulates interstate commerce"); *Serv. Machine & Shipbuilding Corp. v. Edwards,* 617 F.2d 70, 74 (5th Cir. 1980) (local ordinance "facially discriminate[s] in favor of local residents"). None of these decisions are in conflict with the Second Circuit's decision here, which deals with a nondiscriminatory statute. *See* Pet. App. 5.

The other cases relied on by NEMA are equally unhelpful to its claim. The statute considered by the Eighth Circuit in *Burlington Northern R.R. Co. v. Nebraska*, 802 F.2d 994, 1004 (8th Cir. 1986), regulated the means of interstate transportation, a matter which the Second Circuit also recognized as one of special interest under the Commerce Clause. *See* Pet. App. 11-12. Similarly, the Eighth Circuit in *U & I Sanitation v. City of Columbus*, 205 F.3d 1063 (8th Cir. 2000) invalidated an ordinance regulating solid waste flow, a type of regulation that this Court – and the Second Circuit – recognize as burdening interstate commerce. *See, e.g., C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 389-90 (1994)

("While the immediate effect of the ordinance is to direct local transport of solid waste to a designated site within the local jurisdiction, its economic effects are interstate in reach."); *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgt. Auth.*, 261 F.3d 245, 255 (2d Cir. 2001) ("The Supreme Court has left no doubt that flow control regulation affects interstate commerce."). Each of the cited cases, explicitly or not, found a disparate burden on interstate commerce prior to engaging in a *Pike* analysis.[6]

B. The court of appeals correctly applied this Court's precedents.

In deciding this case, the court of appeals looked to and applied this Court's Commerce Clause precedents. The court noted that a statute may violate the dormant Commerce Clause in one of two ways:

> A statute may violate the well-established "dormant" aspect of the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, in one of two ways: it may clearly discriminate against interstate commerce, in which case it is virtually invalid per se, *see Wyoming v. Oklahoma,* 502 U.S. 437, 454, 112 S.Ct. 789, 117 L.Ed.2d 1 (1992), or even if it does not evince such discriminatory effect, it may still be unconstitutional if it imposes a burden on interstate commerce incommensurate with the local benefits secured, *see Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). NEMA argues that section 6621d

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[6] In *Ford Motor Co. v. Texas Dep't of Transp.*, 264 F.3d 493 (5th Cir. 2001), the Fifth Circuit upheld the challenged statute. As a result, this case does not support NEMA's claim that the Fifth Circuit has struck down nondiscriminatory statutes under *Pike*.

> violates the Commerce Clause in the latter manner. We disagree and thus conclude that NEMA cannot show likely success on the merits of its Commerce Clause claim.

Pet. App. 5. As this case involves no claim of discrimination, the court considered whether the statute should be invalidated under the *Pike* test. The court's decision upholding Vermont's statute is entirely consistent with this Court's precedents.

1. The court began its *Pike* analysis by evaluating whether the statute imposed an incidental burden on interstate commerce, which it defined as a "burden on interstate commerce that is qualitatively or quantitatively different from that imposed on intrastate commerce." Pet. App. 6. NEMA objects to the court's phrasing on this point, but the Second Circuit's opinion shows that the lower court paid careful attention to this Court's Commerce Clause precedents. Although this Court has not supplied a precise definition for the phrase "incidental burden," the Court has suggested, and the Second Circuit recognized, that state regulations burden interstate commerce when, in some manner, they "shift[] the costs of regulation to other states." Pet. App. 6-7; *see also id.* at 8-13 (discussing potential burdens on interstate commerce, such as controlling commerce occurring outside the state's borders, restricting interstate transport, or creating an actual conflict with other state regulations).

In this case NEMA argued that the statute burdened interstate commerce in two ways: (1) by controlling commerce that occurs wholly beyond Vermont's borders; and (2) by imposing regulatory requirements that risk being inconsistent with those of other states. Pet. App. 7. The court rejected both of NEMA's alleged "burdens."

First, the Court found that the statute does not regulate commerce outside of Vermont because it does not "require manufacturers to label all lamps wherever distributed." Pet. App. 9. Although manufacturers may choose to label all lamps, they could instead label only those lamps destined for Vermont, and pass on the additional cost to Vermont consumers, or they could withdraw from the Vermont market. *Id.* at 9-10. The statute may thus impose additional burdens on Vermont consumers, through higher prices or less consumer choice, but those *intrastate* burdens do not offend the Commerce Clause.[7] *Id.* at 10-12 (citing, among other cases, *Exxon Corp. v. Governor of Md.*, 437 U.S. 117 (1978)).

Second, although the court of appeals acknowledged that a "state regulation might impose a disproportionate burden on interstate commerce if the regulation is in substantial conflict with a common regulatory scheme in place in other states," the court found no such conflict here. Pet. App. 12-13. "NEMA concedes that no other state even regulates the labeling of mercury-bearing bulbs, much less does so in conflict with Vermont's approach." *Id.* at 13.

Accordingly, having found that Vermont's statute imposed no "incidental burdens" on interstate commerce, the court declined to engage in the *Pike* balancing test, and concluded that NEMA failed to show a likelihood of success on its Commerce Clause claim.

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[7] The Second Circuit noted that this regulation does not encourage out-of-state manufacturers to leave the Vermont market, or encourage in-state manufacturers to pick up the slack. Pet. App. 11. As NEMA acknowledges, there are no in-state manufacturers who could benefit from this regulation. Pet. 22-23.

2. In its petition, NEMA does not challenge the Second Circuit's conclusions discussed above. Instead, NEMA argues that the Second Circuit was obligated to engage in *Pike* balancing even though the court found no "incidental burdens" on interstate commerce to tip the scale in NEMA's favor. This Court's decisions, however, do not support NEMA's position. Contrary to NEMA's rigid "two-tiered" analysis, this Court has acknowledged that there is "no clear line" between a facial discrimination challenge and the *Pike* test. *General Motors Corp. v. Tracy*, 519 U.S. 278, 299 n.12 (1997) ("several cases that have purported to apply the undue burden test (including *Pike* itself) arguably turned in whole or in part on the discriminatory character of the challenged state regulations").[8]

Indeed, this Court has upheld state statutes against dormant Commerce Clause challenges without engaging in *Pike* balancing, even while expressly acknowledging that the challenged statutes impacted interstate commerce and interstate firms. *See, e.g., CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 88-92 (1987) (upholding Indiana statute governing corporate takeovers, even though impact fell primarily on out-of-state actors and statute was likely to

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[8] NEMA's claim that the *Pike* balancing test applies only to nondiscriminatory statutes is further undermined by the Court's decision in *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980). In *Lewis*, the Court found that a Florida statute discriminated among businesses based on their contacts with the local economy. *Id.* at 42. The Court found that this "local favoritism or protectionism" was significant to the Commerce Clause analysis but nonetheless evaluated the statute under the *Pike* test: "We need not decide whether this difference is sufficient to render the Florida legislation *per se* invalid, for we are convinced that the *disparate treatment* of out-of-state bank holding companies cannot be justified as an incidental burden necessitated by legitimate local concerns." *Id.* (emphasis added).

reduce the number of hostile tender offers); *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 126-28 (1978) (upholding Maryland law prohibiting oil producers or refiners from operating retail service stations within the State, although law would primarily impact out-of-state firms, some of which were likely to withdraw from the Maryland market). In both cases, notwithstanding the impact on interstate commerce, the Court rejected the Commerce Clause challenges without applying or even discussing the *Pike* balancing test. The Second Circuit's resolution of this case is consistent with the Court's decisions in *CTS* and *Exxon Corp*. The lower court expressly relied on *Exxon*, *see* Pet. App. 10 n.3, 12, and rejected NEMA's implicit claim that shifting business from one interstate supplier to another constituted an impermissible burden on interstate commerce. Pet. App. 10 n.3 (citing *Exxon,* 437 U.S. at 127). As the Second Circuit found no "incidental burdens" on interstate commerce, the court correctly declined to engage in *Pike* balancing.

3. The court of appeals also adhered to this Court's direction that lower courts should not act as super legislatures under the guise of the dormant Commerce Clause. "[I]t is not the function of the courts to substitute their evaluation of legislative facts for that of the legislature." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 470 (1981); *see also CTS*, 481 U.S. at 92 (Court will not "second guess the empirical judgment of lawmakers concerning the utility of legislation"); *Exxon*, 437 U.S. at 129 (rejecting argument that statute would change the structure of the gasoline market as "relat[ing] to the wisdom of the statute, not to its burden on commerce"). As explained in *Clover Leaf Creamery:*

> States are not required to convince the courts of the correctness of their legislative judgments. Rather, "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker."

449 U.S. at 464 (quoting *Vance v. Bradley*, 440 U.S. 93, 111 (1979)). In the absence of strong justification for judicial intervention, the court of appeals properly deferred to the policy choices made by the Vermont Legislature. Pet. App. 7.

C. This case is not well-suited for review by this Court.

As a practical matter, this case is not in an appropriate position for review by this Court, for two reasons. First, the decision in the case is not final. The court of appeals merely reversed the trial court's decision to grant a preliminary injunction. Second, contrary to NEMA's assertions, the evidentiary record is neither clear nor complete.

1. The only issue before the court of appeals in this case was the correctness of the district court's decision granting a preliminary injunction. In its decision, the court of appeals, among other things, found error in the district court's Commerce Clause analysis. Pet. App. 5-14. The court of appeals concluded that NEMA "has failed to show a likelihood of success on the merits of . . . its . . . claims," vacated the preliminary injunction, and remanded the case to the district court. Pet. App. 21. The district

court may permit additional discovery as well as other proceedings in the case before a final judgment issues.[9]

In light of the interlocutory nature of the proceedings, any decision by this Court could not finally resolve the case but would be limited to considering the grant or denial of the preliminary injunction. And even that limited issue is not fully contained with the question presented, because the court of appeals did not reach several other claims of error raised by Vermont, including Vermont's argument that NEMA cannot show a risk of irreparable harm based solely on the costs of complying with the statute.

Neither the district court nor the court of appeals has yet issued a final decision on NEMA's claims in this suit. It would be premature for the Court to accept review of the case at this stage.

2. Contrary to NEMA's assertions, there are significant problems with the evidentiary record and the findings made by the district court. First, although NEMA claims that the court of appeals "did not overturn any . . . findings of fact," Pet. 22, that is not precisely correct.[10] The court of appeals did question some of the district court's findings, expressing skepticism about the "true costs of labeling over time." Pet. App. 10 n.3. The court of appeals also

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[9] In Vermont's view, based on representations made by NEMA during the preliminary injunction proceedings, the district court should not permit further discovery by NEMA nor permit NEMA to supplement its evidence. The district court, however, has not yet even considered, much less resolved, any of these matters. All proceedings in the district court have been stayed pending this Court's decision on the Petition.

[10] The district court did not set forth specific findings of fact.

rejected the district court's finding that Vermont was "presuming to legislate outside its own boundaries," noting that in fact the statute is "indifferent" to sales outside Vermont. Pet. App. 8, 9.

Moreover, Vermont raised a number of other issues on appeal that the court of appeals did not need to reach. Vermont was unable to produce critical expert testimony at the preliminary injunction hearing, because its experts were unavailable on short notice and the district court declined to accept their affidavits or continue the hearing. The excluded evidence included testimony regarding the extent of mercury contamination caused by broken fluorescent lamps. JA 164-180 (Lindberg Aff.). The district court also excluded affidavits from officials from other New England states that showed that Vermont's labeling program did not conflict or interfere with the programs of other states.[11]

After excluding Vermont's proffered evidence, the district court then permitted an employee from General Electric to testify, on behalf of NEMA, about the compliance costs for companies other than General Electric, even though the employee had no personal knowledge of those costs. Pet. App. 31. Vermont's hearsay objections to this testimony were repeatedly overruled. JA 246, 256, 276, 278, 307-309; *see also* JA 208-216 (State's Motion to Exclude Hearsay Evidence). And finally, the district court based its Commerce Clause analysis on two hypothetical circumstances that were not supported by the record. First, the district court assumed that the required label would be the symbol for mercury, Hg, in a circle,

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[11] *See supra* note 4.

notwithstanding the statutory requirement that the label "clearly inform the purchaser or consumer that mercury is present in the item and that the item may not be disposed of or placed in a waste stream. . . . " Pet. App. 29-30; *see* 10 Vt. Stat. Ann. tit. 10, § 6621d(a) (1997 & Supp. 2001). Second, the district court inexplicably assumed that manufacturers would invest millions of dollars in creating separation production lines for lamps destined for Vermont, notwithstanding testimony by NEMA's own witness that manufacturers would undertake substantially less expensive compliance measures. Pet. App. 31.

Vermont raises these matters not to argue their merits, but merely to demonstrate the incomplete state of the evidentiary record. NEMA apparently presented its entire case at the preliminary injunction hearing, but, given the short time frame and the district court's refusal to continue the hearing or admit affidavits from unavailable witnesses, Vermont was not afforded a similar opportunity.[12] These problems with the underlying record provide further support for allowing this case to continue to final judgment in the lower courts.

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[12] Vermont agrees with the court of appeals that the statute itself, coupled with NEMA's failure to show any incidental burdens on interstate commerce, provides a sufficient basis for rejecting NEMA's dormant Commerce Clause claim. If this Court were to agree with NEMA that the statute should be subjected to *Pike* balancing, however, Vermont has not had a full opportunity to challenge the costs of compliance or to establish the benefits provided by the statute.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Vermont Statutes Annotated, title 10, § 6621d(a), provides as follows:

> Effective March 1, 2000, a manufacturer or wholesaler may not sell at retail in this state, to a retailer in this state, or for use in this state, and a retailer may not knowingly sell, any of the following items at retail if they contain mercury added during manufacture, unless the item is labeled. The label must clearly inform the purchaser or consumer that mercury is present in the item and that the item may not be disposed of or placed in a waste stream destined for disposal until the mercury is removed and reused, recycled, or otherwise managed to ensure that it does not become part of solid waste or wastewater. Primary responsibility for affixing labels required under this section shall be on the manufacturer, and not on the wholesaler or retailer. By October 1, 1999, each manufacturer required to label by this section shall certify to the agency of natural resources that it has developed a labeling plan for its mercury-added products that complies with this section and any administrative labeling rule adopted by the agency of natural resources and that this labeling shall be implemented for products manufactured after March 1, 2000. The labeling plan shall include detailed descriptions of the products involved and the label size, material, content, location, and attachment method for each product and for the product packaging, where necessary under the rules, so a label is clearly visible at time of purchase. The plan must be submitted to the agency with the certification. Items to be labeled are:
>
> (1) A thermostat or thermometer.
>
> (2) A switch, individually or as part of another product.

(3) A medical or scientific instrument.

(4) An electric relay or other electrical device.

(5) A lamp.

(6) A battery, sold to the public, other than a button battery.

Section 6-803 of the Vermont Solid Waste Management Rules provides as follows:[1]

(a) To facilitate the source reduction of mercury from solid waste and to help ensure proper handling, recycling and disposal of waste mercury-added consumer products, certain mercury-added items must be labeled prior sale.

(1) After July 1, 1999,[2] a manufacturer or wholesaler may not sell at retail in this state, to a retailer in this state, or for use in this state, and a retailer may not knowingly sell, any of the items listed in 10 V.S.A. §6621d(a) at retail if they contain added mercury, unless the item is labeled in accordance with Subsections 6-803(b) or (c).

(2) Items to be labeled are:

(A) A thermostat or thermometer.

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[1] The complete text of the mercury-labeling rule is available on the Vermont Agency of Natural Resources' website at www.anr.state.vt.us/dec/wastediv/solid/websumm.htm.

[2] Amended by statute to March 1, 2000. Vermont Act No. 63 § 5 (1999), codified at Vermont Statutes Annotated, title 10, § 6621d(a).

(B) A switch, individually or as part of another product.

(C) A medical or scientific instrument.

(D) An electric relay or other electrical device.

(E) A lamp.

(F) A battery, sold to the public, other than a button battery.

(b) The following labeling standards shall apply to all mercury-added consumer products listed in Subsection 6-803(a)(2) above:

(1) The label must clearly inform the purchaser or consumer that mercury is present in the item and that the item may not be disposed of or placed in a waste stream destined for disposal until the mercury is removed and reused, recycled, or otherwise managed to ensure that mercury does not become part of solid waste or wastewater.

(2) A label must be clearly visible and legible to consumers prior to purchase of the product. The label must be located on a surface of the product that is visible during installation and removal.

(3) For labels affixed to products, the required words or symbols must be printed, mounted, molded, or engraved on the surface of the product using materials sufficiently durable to remain legible for the useful life of the product.

(4) For products with enclosed mercury-added switches, both the enclosed device and the larger product must be labeled.

(5) A listed mercury-added consumer product must be labeled if manufactured after July 1, 1999.[3]

(6) Primary responsibility for affixing the required labels shall be on the manufacturer, and not on the wholesaler or retailer.

(c) The Secretary may administratively authorize alternative labeling, including package labeling, for mercury-added consumer products listed in Subsection 6-803(a)(2) above under the following conditions:

(1) A manufacturer must submit a written request for alternative labeling documenting that a product or class of products cannot reasonably be labeled to comply with specific requirements of Subsections 6-803(a) and/or (b) above.

(2) All authorizations for alternative labeling granted under this Subsection will be limited in duration and may be renewed.

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[3] *See supra* note 2.